Penang Port Commission v Kanawangi s/o Seperumaniam

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-16-1994

MAHADEV SHANKAR, VC GEORGE JJCA AND ABDUL MALEK AHMAD J

2 AUGUST 1995

Labour Law *— Workmen's compensation — Claim for damages — Dismissal — Whether could be awarded for the manner of dismissal, injured feelings or loss sustained as dismissal makes it more difficult to obtain fresh employment*

Civil Procedure *— Interim application — Plaintiff obtained summary judgment against defendant — Deputy registrar assessed and awarded damages to plaintiff — Pending defendant's appeal to Court of Appeal — Defendant's application for stay of execution refused — Plaintiff obtained garnishee order — Obtained judgment sum from defendant's banker — Court of Appeal made order restraining plaintiff from dissipating money pending disposal of defendant's formal application for injunction — Plaintiff refused to give particulars of fixed deposit account to defendant — Defendant filed interim application for order that plaintiff hand over to court certificate of fixed deposit account pending disposal of appeal — Whether Court of Appeal had jurisdiction — Whether amounted to Mareva injunction — Courts of Judicature Act 1964 s 44(1) & (3)*

In 1987, a Mr Kanawangi s/o Seperumaniam ('the respondent') filed an action in the High Court claiming: (i) that the termination of his service by the Penang Port Commission ('the appellant') was ultra vires the Penang Port Commission Act 1955; (ii) that he was entitled to be confirmed as a traffic supervisor; (iii) that he was entitled to all arrears of emoluments; and (iv) damages. In February 1994, the respondent obtained summary judgment against the appellant in the High Court, and the appellant appealed to the Court of Appeal. Whilst the appeal was pending, the respondent proceeded before the deputy registrar to assess damages, and an order awarding the respondent RM2,274,151.42 of which RM2m was for distress, anguish, anxiety, inconvenience, embarrassment and humiliation, was made ('the first order'). The respondent appealed to the judge in chambers against the first order. However, the hearing was adjourned as there was difficulty in obtaining the deputy registrar's notes of evidence or grounds of judgment. Meanwhile, the appellant's application for a stay of execution was dismissed by the deputy registrar ('the second order'). The respondent then took steps to enforce the deputy registrar's order. He applied for a garnishment order and served a notice on the appellant's bank ('BBMB') to show cause why the order should not be made absolute. Following that, the appellant filed an application to strike out the garnishee order. The deputy registrar, however, made the garnishee order absolute ('the third order') without first determining the validity of this application. The appellant's appeal against the second and third orders as well as a separate application for stay were dismissed by the

judge. Although the appellant later successfully obtained an ex parte interim order that there be a stay of the deputy registrar's order and the garnishee order until the hearing of the application inter partes on 3 January 1995 from the President of the Court of Appeal, the respondent had already obtained the bank draft from BBMB by then. When the matter came for hearing before the full court on 3 January 1995, the respondent stated that he had placed the bank draft in a fixed deposit account with Bank Pertanian Malaysia. The court then made an order restraining the respondent from dissipating the money pending the disposal of a formal application by the appellant for an appropriate injunction for the preservation of this money. The appellant's solicitors were left to obtain particulars of the fixed deposit account from the respondent's solicitors, which the respondent declined to give. The appellant's solicitors thus filed this interim application for an order that the respondent hand over to the court, inter alia, the certificate of the fixed deposit account pending the final disposal of this appeal. Counsel for the respondent resisted the appellant's application, on the grounds, inter alia, that: (i) the Court of Appeal had no jurisdiction to make the order as prayed by the appellant because such an order amounted to a Mareva injunction which could only be made by the High Court; and (ii) s 44 of the Courts of Judicature Act 1964 ('the CJA') had no application in this case. The respondent had also filed a cross-application, praying that the order made by the court on 3 January 1995 be set aside, and consequential damages.

Held, allowing the appellant's application, and dismissing the respondent's cross-application:

(1) If the respondent was aggrieved by the order of this court on 3 January 1995, his only remedy was to appeal. This he failed to do (see p 434C).

(2) Damages cannot be awarded for the manner of the dismissal of his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. The court was at a total loss to understand on what basis the deputy registrar thought fit to award a huge round sum of RM2m under this head (see p 434G–H); *Addis v Gramophone Co Ltd* [1909] AC 488 followed.

(3) The basis on which the deputy registrar proceeded to calculate the alleged 'arrears' of emoluments due to the respondent from 1 March 1985 (as also the award of RM2m) would have been an unsolved mystery, at least until the deputy registrar's notes of evidence and grounds of judgment became available (see p 435A).

(4) Loss must be shown to have actually occurred and also be recoverable in law before the award of damages can be made. In the absence of these materials, the court was of the opinion that the trial judge erred in law in refusing the appellant's application for a stay of execution (see p 435B).

(5) The conduct of the respondent called for comment. The respondent's solicitors, was a sole proprietorship and the respondent was that sole proprietor. He was acting as solicitor in a matter in which he was personally involved (see p 435C).

(6) Section 44(1) of the CJA provided that in any proceeding pending before the Court of Appeal, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding may at any time be made by a judge of the Court of Appeal. Section 44(3) clearly vests the full court with parallel jurisdiction which extended to varying the order of the single judge (see p 435E).

(7) To prevent prejudice to the appellant pending the hearing of the appeal against the deputy registrar's award, it was imperative that the respondent be compelled to disgorge if not the money then at least the fixed deposit receipt so that the subject matter could be preserved until the final disposal of the appellant's appeals. The appellant, in the court's view, had a very powerful appeal to argue on the measure of damages the respondent was entitled to recover. There was a very real risk that the appeal would be wholly nugatory if this court did not intercede (see p 435F–H).

[Bahasa Malaysia summary

Dalam tahun 1987, seorang bernama En Kanawangi a/l Seperumaniam ('penentang') memfailkan suatu tindakan di Mahkamah Tinggi yang menuntut: (i) bahawa pemberhentian perkhidmatannya oleh Suruhanjaya Pelabuhan Pulau Pinang ('perayu') adalah ultra vires Akta Suruhanjaya Pelabuhan Pulau Pinang 1955; (ii) bahawa dia berhak diterima sebagai seorang penyelia lalu lintas; (iii) bahawa dia berhak kepada semua tunggakan emolumen; dan (iv) ganti rugi. Dalam bulan Februari 1994, penentang telah memperolehi penghakiman terus terhadap perayu di Mahkamah Tinggi, dan perayu membuat rayuan kepada Mahkamah Rayuan. Sementara rayuan menunggu penyelesaian, penentang telah meneruskan tindakan di hadapan penolong pendaftar untuk menaksir ganti rugi, dan suatu perintah yang mengawardkan penentang RM2,274,151.42 daripada mana RM2 juta adalah untuk distres, seksaan, kekhuatiran, kesulitan dan rasa malu, telah dibuat ('perintah pertama'). Penentang merayu kepada hakim dalam kamar terhadap perintah pertama. Namun demikian, pembicaraan telah ditangguhkan oleh kerana terdapat kerumitan dalam memperolehi nota keterangan atau alasan penghakiman penolong pendaftar. Sementara itu, permohonan perayu untuk penggantungan pelaksanaan telah ditolak oleh penolong pendaftar ('perintah kedua'). Penentang kemudiannya telah mengambil langkah untuk menguatkuasakan perintah penolong pendaftar. Dia telah memohon perintah garnisan dan menyampaikan notis kepada bank perayu ('BBMB') untuk menunjuk sebab mengapa perintah itu tidak harus dijadikan muktamad. Berikutnya, perayu

memfailkan suatu permohonan untuk membatalkan perintah garnishee. Walau bagaimanapun, penolong pendaftar telah membuat perintah garnishee muktamad ('perintah ketiga') tanpa menentukan kesahan permohonan ini terlebih dahulu. Rayuan perayu terhadap perintah kedua dan ketiga bersama dengan permohonan yang berasingan untuk penggantungan telah ditolak oleh hakim dalam kamar. Walaupun perayu kemudiannya berjaya memperolehi suatu perintah interim ex parte bahawa perintah penolong pendaftar dan perintah garnishee patut digantung sehingga pembicaraan permohonan secara inter partes pada 3 Januari 1995 daripada Presiden Mahkamah Rayuan, penentang telah pun memperolehi draf bank daripada BBMB pada masa itu. Apabila perkara itu dibicarakan di hadapan mahkamah penuh pada 3 Januari 1995, penentang menyatakan bahawa dia telah meletakkan draf bank itu dalam sebuah akaun simpanan tetap dengan Bank Pertanian Malaysia. Mahkamah kemudiannya membuat perintah yang menahan penentang daripada melesapkan wang sementara menunggu penyelesaian permohonan rasmi oleh perayu untuk injunksi yang sesuai bagi pengekalan wang ini. Peguamcara perayu ditugaskan mendapatkan butir-butir akaun simpanan tetap daripada peguamcara penentang, tetapi penentang enggan memberikannya. Oleh itu, peguamcara perayu memfailkan permohonan interim ini untuk suatu perintah agar penentang menyerah kepada mahkamah, antara lain, sijil akaun simpanan tetap itu sementara menunggu penyelesaian muktamad rayuan ini. Peguam untuk penentang membantah permohonan perayu, atas alasan, antara lain, bahawa: (i) Mahkamah Rayuan tidak mempunyai bidang kuasa untuk membuat perintah sebagaimana yang dipohon oleh perayu sebab perintah sedemikian sama seperti injunksi Mareva yang hanya boleh dibuat oleh Mahkamah Tinggi; dan (iii) s 44 Akta Mahkamah Kehakiman 1964 ('AMK') tidak terpakai dalam kes ini. Penentang juga telah memfailkan suatu permohonan balas, memohon supaya perintah yang dibuat oleh mahkamah pada 3 Januari 1995 diketepikan, dan untuk ganti rugi berbangkit.

Diputuskan, membenarkan permohonan perayu, dan menolak permohonan balas penentang:

(1) Jika perintah mahkamah ini pada 3 Januari 1995 telah menyebabkan penentang terkilan, remedi tunggalnya adalah untuk membuat rayuan. Dia telah gagal berbuat demikian (lihat ms 434C).

(2) Ganti rugi tidak boleh diawardkan atas cara bagaimana perasaan tersinggung penentang telah disingkirkan atau untuk kerugian yang mungkin dialami daripada fakta bahawa pemecatan itu sendiri menyebabkan pekerjaan baru lebih sukar untuk didapati. Mahkamah tidak memahami dasar yang difikirkan wajar oleh

penolong pendaftar dalam mengawardkan jumlah besar sebanyak RM2 juta di bawah bahagian kepala ini (lihat ms 434G–H); *Addis v Gramophone Co Ltd* [1909] AC 488 diikut.

(3) Dasar yang digunakan oleh penolong pendaftar bagi menghitung 'tunggakan' emolumen yang dikatakan terhutang kepada penentang dari 1 Mac 1985 (dan juga award sebanyak RM2 juta) akan kekal sebagai tanda tanya yang tidak dijelaskan, sekurang-kurangnya sehingga nota keterangan dan alasan penghakiman penolong pendaftar boleh diperolehi (lihat ms 435A).

(4) Kerugian mestilah ditunjukkan telah benar-benar berlaku dan juga boleh didapatkan kembali dari segi undang-undang sebelum award ganti rugi boleh dibuat. Dalam ketiadaan material ini, mahkamah berpendapat bahawa hakim perbicaraan telah melakukan kesilapan undang-undang dalam menolak permohonan perayu untuk penggantungan pelaksanaan (lihat ms 435B).

(5) Kelakuan penentang harus diberikan ulasan. Peguamcara penentang merupakan suatu ketuanpunyaan tunggal and penentang merupakan tuan punya tunggal. Dia bertindak sebagai peguamcara dalam suatu perkara yang dia terlibat secara peribadi (lihat ms 435C).

(6) Seksyen 44(1) AMK memperuntukkan bahawa dalam apa-apa prosiding yang menunggu penyelesaian di Mahkamah Rayuan, apa-apa perintah interim bagi mengelakkan kemudaratan pada tuntutan pihak-pihak sementara menunggu pembicaraan prosiding boleh dibuat pada bila-bila masa oleh seorang hakim Mahkamah Rayuan. Seksyen 44(3) jelas meletakhak mahkamah dengan bidang kuasa yang setara yang dilanjutkan kepada pengubahan perintah hakim yang tunggal (lihat ms 435E).

(7) Bagi mengelakkan kemudaratan pada perayu sementara menunggu pembicaraan rayuan terhadap award penolong pendaftar, adalah penting sekali bahawa penentang dipaksa menyerahkan kembali wang itu, dan jika tidak sekurang-kurangnya resit simpanan tetap supaya isi boleh dikekalkan sehingga penyelesaian muktamad rayuan perayu. Dalam pandangan mahkamah, perayu mempunyai rayuan yang kukuh untuk dihujahkan atas taksiran ganti rugi yang boleh didapatkan balik oleh penentang. Terdapat risiko bahawa rayuan tidak berguna pada keseluruhannya jika mahkamah ini tidak mencampur tangan (lihat ms 435F–H).]

Case referred to

Addis v Gramophone Co Ltd [1909] AC 488

Legislation referred to

Courts of Judicature Act 1964 s 44, 44(1), (3)
Penang Port Commission Act 1955 s 39

Appeal from: Civil Suit No S6–22–208–87 (High Court, Kuala Lumpur)

Raja Aziz Addruse (*Ramsun Ho Chii Huey* with him) (*Lim Huck Aik & Co*) for the appellant.
K Balaguru (*Amarasekara* with him) (*Khana & Co*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): This is an interim application by the appellant (encl 20a) for an order that the respondent do hand over to the deputy registrar of this court, pending the final disposal of this appeal, the certificate of the fixed deposit account into which the respondent placed the sum of RM2,351,725.80 — which was paid by the appellant's bankers to the respondent — and for consequential directions regarding the disposal of the said money.

We also had to deal with an application by the respondent (encl 23a). These applications were listed as items 4A and 4B, and we heard them together.

In 1987, the respondent filed an action in the High Court claiming that the termination of his service was ultra vires the Penang Port Commission Act 1955 ('the Act'), that he was therefore entitled to all arrears of emoluments, that he was entitled to be confirmed as a traffic supervisor, and damages and others.

In February 1994, the respondent applied for summary judgment. The judge granted an order in terms on 20 October 1994. The appellant appealed to this court. Whilst this appeal was pending, the respondent proceeded before the deputy registrar to assess the damages. On 24 October 1994, the deputy registrar made an order awarding the respondent RM2,274,151.42 of which RM2m was for distress, anguish, anxiety, inconvenience, embarrassment and humiliation. The appellant appealed to the judge in chambers against this assessment. There appears to have been some difficulty in obtaining the deputy registrar's notes of evidence of the hearing pertaining to the assessment or his grounds of judgment as to how he felt entitled to award this global sum. In the absence of this material, the appellant was not able to proceed with its appeal against this assessment on the dates fixed and the hearing was adjourned.

Immediately after the deputy registrar made his order on 24 October 1994, the appellant's solicitors applied for a stay of execution. They were advised by the deputy registrar to file a written application. This they did on 3 November 1994. But when this matter came up for hearing on 18

A November 1994, the deputy registrar informed the appellant's solicitors that he had dismissed their oral application on 26 October 1994. He then proceeded to dismiss the written application he had directed the appellant to file on the ground that he was functus officio.

The respondent, in the meantime, took steps to enforce the deputy B registrar's order. He applied for a garnishment order on 11 November 1994, and served a notice on the appellant's bankers (Bank Bumiputera Malaysia Bhd ('BBMB')) to show cause why the garnishment order should not be made absolute.

The appellant filed an application on 6 December 1994 to strike out the garnishee order on the ground that s 39 of the Act imposed statutory C trusts on the general account of the appellant, and it could not therefore be garnished.

Without first determining the validity of this application, the deputy registrar made the garnishee order absolute on 7 December 1994. On 8 December 1994, the appellant appealed to the judge against this order and D against the deputy registrar's refusal to grant a stay of execution.

On 12 December 1994, the respondent's solicitors demanded that BBMB pay the full sum by noon on 13 December 1994 or face an application for contempt. At this point, we should mention that the respondent's solicitors, Khana & Co, is a sole proprietorship and the E respondent is that sole proprietor.

By 19 December 1994, the notes of evidence and grounds of judgment of the deputy registrar for his assessment of damages were still not available. The learned judge dismissed the appellant's appeals against the making absolute of the garnishment order, against the refusal granting a stay of F execution and also dismissed a separate application for stay. The appeal against the assessment of damages was adjourned once again.

The appellant then filed on the same day an application to this court for a stay of execution of the deputy registrar's assessment and the garnishee order. Counsel for the appellant tried to see the learned president of this G court the same day but was unable to do so as the learned president was not available. He managed to see the learned president on 20 December 1994 to make an ex parte application, but by then the respondent had already forced BBMB to give him a draft for the said money. The learned president nevertheless made an interim order ex parte that there be a stay of the registrar's order and the garnishment order until the hearing of the H application inter partes on 3 January 1995. This order was served on the respondent on 20 December 1994.

When the matter came for hearing before the full court on 3 January 1995, the respondent — in answer to the court — revealed that as soon as he got the draft from BBMB, he placed the money in a fixed deposit I account with Bank Pertanian Malaysia in the names of members of his family whom he did not identify. The court then made an order restraining

the respondent from dissipating the money pending the disposal of a formal application by the appellant for an appropriate injunction for the preservation of this money. The appellant's solicitors were left to obtain particulars of the fixed deposit account from the respondent's solicitors. However, when the appellant's solicitors wrote for this information, the respondent declined to give any reply.

The appellant's solicitors thus filed this application without being able to give precise details as to what the respondent did with the money, which is the subject matter of this appeal.

As we indicated earlier, the respondent filed a cross-application (4B). In it, the respondent prayed that the order made by this court on 3 January 1995 be set aside, and that damages sustained by the respondent as a consequence of this order be assessed by the deputy registrar of this court and paid by the appellant. If the respondent was aggrieved by the order of this court on 3 January 1995, his only remedy was to appeal. This he failed to do.

As against the appellant's application, counsel for the respondent submitted that this court had no jurisdiction to make such an order because such an order amounted to a Mareva injunction; that being an interlocutory order it is not appealable; that only the High Court could make such an order; and finally, that s 44 of the Courts of Judicature Act 1964 ('the CJA') had no application.

With respect, we were unable to make any sense of this submission. This entire exercise had its genesis in the appellant's efforts to preserve the subject matter of this action until the final disposal of this appeal. The respondent's reluctance to come out with full particulars as to what he had done with it and his contention that the court should not interfere with his right to the fruits of his litigation has justifiably increased the apprehensions of the appellant that there is a very real risk that a successful appeal could be rendered nugatory.

There are other very disturbing features about this litigation. *Addis v Gramophone Co Ltd* [1909] AC 488 is well-entrenched in the common law, and damages cannot be awarded for the manner of the dismissal of his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. We are at a total loss to understand on what basis the deputy registrar thought fit to award a huge round sum of RM2m under this head. The respondent refused to turn up for work on 1 March 1985 claiming that he had been constructively dismissed. It is far from clear whether the deputy registrar considered the respondent's duty to mitigate his damage. Furthermore, the respondent claimed that he was entitled to be confirmed as traffic supervisor because he thought he was qualified for the post. The undeniable fact is that he was never appointed to that post by the appointing

authority. The basis on which the deputy registrar proceeded to calculate the alleged 'arrears' of emoluments due to the respondent from 1 March 1985 (as also the award of RM2m) would have been an unsolved mystery, at least until the deputy registrar's notes of evidence and grounds of judgment became available. Damages are not awarded simply because the plaintiff has thrown them at the head of the court. The loss must be shown to have actually occurred and also be recoverable in law before the award can be made.

In the absence of these materials, we are of the opinion that the trial judge erred in law in refusing the appellant's application for a stay of execution.

The conduct of the respondent calls for comment. He was acting as solicitor in a matter in which he was personally involved. He was aware when he sought to enforce the order in his favour, an appeal was pending and an application for stay was also pending. His stand before us was nothing short of a *fait accompli* — since he had already got the bank draft by 20 December 1994, his claim was that there was no execution left to be stayed and the court is therefore powerless to interfere. Perhaps this is why, when invited to do so, he declined to make full disclosure as to what he did with the money he so precipitately obtained.

The material words in s 44(1) of the CJA are as follows:

> In any proceeding pending before the Court of Appeal ... any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding ... may at any time be made by a Judge of the Court of Appeal.

Section 44(3) clearly vests the full court with parallel jurisdiction which extended to varying the order of the single judge.

To prevent prejudice to the appellant pending the hearing of the appeal against the deputy registrar's award, it was imperative that the respondent be compelled to disgorge if not the money then at least the fixed deposit receipt so that the subject matter could be preserved until the final disposal of the appellant's appeals.

The appellant, in our view, had a very powerful appeal to argue on the measure of damages the respondent was entitled to recover. The question as to whether the High Court could appoint him to the post he claimed to be qualified for was another issue. In all the circumstances, it was clear to us that there was a very real risk that the appeal would be wholly nugatory if we did not intercede. We therefore dismissed the respondent's application and made an order in terms of the appellant's application.

After we did so, Mr Balaguru of counsel for the respondent undertook to produce the fixed deposit receipt the next day but claimed that the respondent had aggregated other money of his own into the fixed deposit

he created. We therefore gave the respondent liberty to apply for a further order with the concurrence of the appellant's solicitors for the necessary arrangements required to get the respondent's other money in excess of RM2,351,725.80 released to him subject to any other orders required as to the proper disposal of the interest earned.

Order accordingly.

Reported by Isabel Liong